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AW PECK LUAN & ANOR v. KAU PECK GUAT

HIGH COURT MALAYA, KUALA LUMPUR
ARZIAH MOHAMED APANDI JC
[SUIT NO: WA-22NCVC-374-05-2021]
5 FEBRUARY 2025

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Abstract – *The burden of proof, ie, the onus of proving the validity of a will, lies on the propounder who must satisfy the court that the testator signed the will, was of sound and disposing mind, understood the nature and effect of the dispositions, and signed it of their own free will. When a propounder takes a prominent part in a will's execution while receiving substantial benefits, this itself creates suspicious circumstances requiring careful scrutiny. The totality of evidence, namely the questionable testamentary capacity evidence, multiple suspicious circumstances, witness inconsistences and the propounder's failure to adequately dispel these concerns, concludes that a will cannot stand.*

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SUCCESSION: *Probate – Will – Testamentary capacity – Assessment of – Whether there was indication of possible impairment during execution of will – Whether testator on multiple medications impairing cognitive abilities – Whether testator suffered acute or subacute changes affecting testamentary capacity – Whether there existed suspicious circumstances – Whether will constituted valid last will and testament of testator*

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The testator, while working in Singapore decades ago, formed a relationship with the first plaintiff, Aw Peck Luan ('Mdm Aw'), resulting in two children: the second plaintiff, Rachel, and Hui Sheng. Eventually, the testator left Singapore and returned to Malaysia, where in 1987, he married the defendant, Kau Peck Guat ('Mdm Kau'). They had two children together. For over 30 years, the testator lived with Mdm Kau in Malaysia, rarely visiting or contacting his family in Singapore. When the testator was diagnosed with stage 4 lung cancer in July 2020, he chose not to inform his Singapore family. On 6 October 2020, while hospitalised, the testator the executed a will prepared by a lawyer, Tan. The will named his Malaysian wife, Mdm Kau, as both executor and sole beneficiary. On 8 October 2020, the testator passed away. When the Singapore family discovered they had been excluded from the will, they filed legal challenges, alleging that the testator lacked testamentary capacity when signing the document. The Singapore family claimed he was unconscious, critically ill and unable to make rational decisions. They also argued it was suspicious that the testator would exclude them despite supposedly having a good relationship. Thus, the will was challenged by Mdm Aw, who claimed to be the testator's first wife, and his daughter, Rachel. The issues that arose were (i) whether the will

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dated 6 October 2020 constituted the valid last will and testament of the deceased; (ii) whether the deceased executed the will dated 6 October 2020 as pleaded by the defendant; (iii) whether there existed suspicious circumstances; (iv) whether at the time of the execution of the will dated 6 October 2020, the deceased had testamentary capacity; (v) whether the defendant was entitled to the counterclaim; and (vi) whether the plaintiffs were entitled to their claim.

Held (allowing plaintiffs' claims; dismissing defendant's counterclaim):

(1) The burden of proving testamentary capacity lies with the party propounding the will (defendant), while the burden of proving suspicious circumstances lay with those challenging it (plaintiffs). The courts do not approach a will with inherent doubts, but to examine it cautiously and with circumspection. The burden of proof, *ie*, the onus of proving a will, lies on the propounder who must satisfy the court that the testator signed the will, the testator was of sound and disposing mind, the testator understood the nature and effect of the dispositions, and the testator signed it of their own free will. (paras 14 & 23)

(2) The evidence raised serious doubts about whether the testator possessed the requisite testamentary capacity when executing the will on 6 October 2020. One Dr Rajbans made a crucial distinction between being merely 'awake' versus truly 'alert' – emphasising that a patient could be awake and able to respond without having the mental alertness required for important decisions. He testified: 'Patient is awake; he can answer you, but that doesn't mean you are alert' and 'Someone can be drunk and still tell you things that you think, but are not alert.' This medical distinction is critical when assessing testamentary capacity. (para 31)

(3) The defendant's case relied heavily on layperson witness testimony regarding the testator's apparent alertness, but these witnesses lacked the medical expertise to assess mental capacity properly. Dr Lam, who was actually treating the testator, gave evidence indicating a possible impairment, stating that it was 'hard to tell' about the testator's condition and noted he was on significant medication. This contemporaneous medical evidence could not be dismissed in favour of observations by non-medical witnesses. (para 33)

(4) What was to be determined was whether the testator was only mentally compromised and drowsy on 7 October 2020 (when dosages were increased) or whether he was already compromised earlier, specifically on 6 October 2020, when he allegedly signed the will. The expert, Dr Jacob ('PW1'), a senior consultant psychiatrist, testified as an expert witness regarding the testamentary capacity of the testator. He reviewed records from multiple hospitals, including Pantai Hospital Kuala

Lumpur, where the testator was admitted from 1 to 8 October 2020. The testator had stage 4 neuroendocrine carcinoma of the left lung with liver metastasis and was on multiple medications, which could impair cognitive abilities. PW1 concluded it was highly probable that the testator did not possess sufficient testamentary capacity at the time of signing of the will due to the influence of multiple medications that could impair cognitive abilities. Despite no assessment of the testator's mental capacity made before he signed the will, the surrounding circumstances and the absence of evidence to negate his mental incapacity had increased suspicions about the creation of the will. (paras 37-45)

(5) Tan, the solicitor who prepared the will, said he had read and explained the will to the testator, and the latter had indicated his understanding through verbal and non-verbal responses. Tan stated that the testator remained sufficiently alert to invite witnesses for coffee and recall the discussion of billing arrangements, demonstrating continued mental clarity. However, this narrative was very far-fetched. The testator was already on high drug painkillers, including Fentanyl, when he signed the will. He could not even sign properly; what more chat with Tan and discuss his payments. Tan, during his testimony in the courtroom, appeared disengaged, restless and unable to recall most of the events that were crucial to the defendant's case. The defendant failed to establish the solicitor-client relationship of Tan and the testator. (paras 46-48)

(6) There were troubling inconsistencies among the witness accounts of the will's signing. Despite allegedly being present together, the witnesses gave conflicting testimony about basic facts, including who was present, how the testator indicated his understanding, and what occurred after the signing. These were not minor discrepancies but fundamental contradictions about the same event. Additionally, the hospital records directly contradicted the accounts of the witnesses. The clinical record by a nurse noted only one relative was present, yet multiple witnesses claimed to have been present with the testator. No hospital witnesses, including Dr Lam and Dr Rajbans, supported their contention that they witnessed the signing of the will during that period on that particular day at the testator's deathbed. The record showed the testator did not want disturbance, which contradicted the defendant's witnesses that the testator chatted and even wanted to have coffee with them when he was enduring great pain without his oral medication. The defendant's witnesses were untruthful as they all had concocted their stories to fabricate how the testator signed the will. (paras 53-56)

(7) Witness testimonies must be critically assessed together with contemporaneous documents. The bank records demonstrated that the testator maintained regular maintenance payments to the first plaintiff

until his final month, including after his cancer diagnosis. He took deliberate steps to conceal these payments from the defendant, suggesting he felt ongoing responsibility to his first family while managing complex dynamics. The will's complete exclusion of the plaintiffs appeared inconsistent with this pattern of conduct and raised questions about whether it truly reflected his wishes. (para 59)

(8) The testator suffered not only physical illness but also mental illness when he consumed medications, including high-dosage painkiller drugs, to ease his pain. The side effects of the medicines and drugs led him to become mentally impaired with mood disorders, including depression and bipolar disorder, which may produce cognitive distortions (delusions), compromise judgment, and cause irritability or impulsiveness. These acute or subacute changes may affect testamentary capacity and vulnerability to undue influence. The hospital records showed that the deceased was in a deplorable state of body and mind. (para 64)

(9) As the propounder of the will and its sole beneficiary, the defendant must prove its validity and dispel suspicious circumstances. Where a propounder takes a prominent part in the will's execution while receiving substantial benefits, this itself created suspicious circumstances requiring careful scrutiny. Evidence showed the defendant was heavily involved in arranging both the will's preparation and execution, with the will being prepared and executed with unusual haste at her arrangement. The defendant's credibility was further challenged by evidence showing she engaged in an affair with the testator while he was still married to the first plaintiff. This spoke to both her credibility and the dynamics surrounding the will's creation. (paras 76 & 77)

(10) The totality of the evidence, namely, the questionable capacity evidence, multiple suspicious circumstances, witness inconsistencies, and the defendant's failure to adequately dispel these concerns, all concluded that the will could not stand. The defendant had failed to discharge her burden of proving this was the valid last will of a testator with proper capacity. (paras 80 & 81)

Case(s) referred to:

Antonio Dios Caldeira v. Frederick Augustus Gray [1934] CLJU 5; [1934] 1 LNS 5 ***(refd)***
Banks v. Goodfellow (1870) LR 5 QB 549 ***(refd)***
Boughton v. Knight (1873) LR 3 P & D 64 ***(refd)***
Caldeira v. Gray [1936] MLJ 137 PC ***(refd)***
Carmel Mary Soosai v. Josephine Lourdasamy Ratnavathy R Soosai & Ors [1987] 2 CLJ 426; [1987] CLJ (Rep) 498 HC ***(refd)***
Chin Jhin Thien & Anor v. Chin Huat Yean & Anor [2020] 7 CLJ 137 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

A *H Venkatachala Iyengar v. BN Thimmajamma & Others (1959) SCR SUPL (1) 426* ***(refd)***
Pacific Tin Consolidated Corporation v. Hoon Wee Thim [1967] CLJU 118; [1967] 1 LNS 118 FC ***(refd)***
Rex v. Soh Eng Chiang [1937] CLJU 73; [1937] 1 LNS 73 HC ***(refd)***
Shivakumar & Ors v. Sharanabasappa & Ors [2020] (SC) 329 ***(refd)***
B *Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA* ***(refd)***
Tob Weng Keong & Anor v. Tob Chee Hoong [2019] 10 CLJU 150 CA ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 40A r. 2

C *For the plaintiff - Yap Siew Yee & Sim Li Ying; M/s Yap Siew Yee & Co*
For the defendant - Kelvin Ng Chun Yee & Chai Wei Xin; M/s Vin Cheng & Co

Reported by Suhainah Wahiduddin

JUDGMENT

D **Arziah Mohamed Apandi JC:**

Battle Over Tee Kok Cheng's Will

[1] Once upon a time, decades ago, Tee Kok Cheng (Mr Tee), had relationships with different women across borders. First came his relationship with Tan Liang Ying in Malaysia, which resulted in the birth E of their daughter, Tee Kim Lan, in 1980. Although never married to Tan, Mr Tee maintained a close relationship with his daughter.

[2] As time passed, while working in Singapore, Mr Tee formed a relationship with Aw Peck Luan (Mdm Aw), resulting in two children: F Rachel Tee Hui Lin (Rachel) and Tee Hui Sheng (Hui Sheng). Eventually, Mr Tee left Singapore and returned to Malaysia, where in 1987, he married Kau Peck Guat (Mdm Kau). They had two children together, though one sadly passed away in 2006.

[3] For over 30 years, Mr Tee lived with Kau in Malaysia, rarely visiting G or contacting his family in Singapore. Rachel would message her father, Mr Tee, where they would fondly refer Rachel as "Meow" and her mother, Mdm Aw, as "Madam 999" and "Old Penguin". The evidence showed their communication was infrequent and often centred on financial requests. When Mr Tee was diagnosed with stage 4 lung cancer in July 2020, he chose H not to inform his Singapore family despite suggestions from others.

[4] On 6 October 2020, while hospitalised at Pantai Hospital Kuala Lumpur, Mr Tee executed a will prepared by lawyer, Tan Kok Siong (lawyer Tan). The will named his Malaysian wife, Kau, as both executor and sole beneficiary. Multiple witnesses testified that Mr Tee was conscious, I lucid, and understood the contents of what he was signing. Two days later, on 8 October 2020, Mr Tee passed away.

[5] When the Singapore family discovered they had been excluded from the will, they filed legal challenges, alleging that Mr Tee lacked testamentary capacity when signing the document. A profoundly personal dispute unfolded between two families claiming the estate of the late Mr Tee. On one side, stood Mdm Aw and her daughter Rachel from Singapore; on the other, Mdm Kau from Malaysia.

[6] The Singapore family claimed he was unconscious, critically ill, and unable to make rational decisions. They also argued it was suspicious that Mr Tee would exclude them despite supposedly having a good relationship.

[7] The twist in the wind is that the medical records and witness testimonies contradicted these claims. Hospital notes showed Mr Tee was awake and conscious during the will signing. Lawyer Tan and other witnesses described meaningful conversations with him that day. Even the doctors' evidence, although sometimes contradictory, generally supported the fact that Mr Tee was alert when he signed the will.

[8] Particularly telling was a WhatsApp message sent by Rachel the day after the will signing, in which she mentioned that Mr Tee had decided to stop sending money to her mother. This suggested Mr Tee had indeed communicated his intentions about his assets.

[9] The court ultimately had to determine whether Mr Tee had testamentary capacity and whether his will accurately reflected his true wishes to leave his estate to his Malaysian wife, whom he had lived with for over three decades, and whether the will was made consciously and rationally.

[10] His last will and testament ("the will") of the late Mr Tee ("the testator") was executed on 6 October 2020, two days before his passing on 8 October 2020. The will named his Malaysian wife, Mdm Kau ("the defendant"), as his estate's sole executor and beneficiary. The will is being challenged by Mdm Aw, who claims to be the testator's first wife, and Rachel, Mr Tee's daughter (collectively "the plaintiffs").

Courtroom Tussle

[11] In pursuit for justice, the two plaintiffs as the Singapore family were witnesses namely Mdm Aw and Rachel, their three medical experts, Dr Jacob Rajesh (Dr Jacob), Dr Lam Kai Seng (Dr Lam) and Dr Rajbans Singh (Dr Rajbans), and four hospital records staffs. The defendants brought the Malaysian family of three, namely Mdm Kau, Mr Tee Kim Lan and Mr Tee Kong Nee, their will solicitor (lawyer Tan) and two of her friends, namely Mr Woo and Ms Chong. No medical expert witness testified for the defendant.

A **Literature**

[12] The law on testamentary capacity is well-established through cases such as *Banks v. Goodfellow* (1870) LR 5 QB 549 and *Chin Jhin Thien & Anor v. Chin Huat Yean & Anor* [2020] 7 CLJ 137; [2020] 4 MLJ 581. For a will to be valid, a testator must:

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(i) understand the nature and effect of making a will;

(ii) comprehend the extent of their property;

(iii) be able to appreciate claims of potential beneficiaries;

C (iv) not be affected by any disorder of mind that would poison their affections or pervert their sense of right.

[13] *Boughton v. Knight* [1873] LR 3 P & D 64 addressed testamentary capacity (the mental capacity to make a will) where the jury found the testator lacked "sound mind, memory and understanding" when making the

D will. Sir James Hannen distinguished between "eccentricity" (which does not invalidate testamentary capacity) and "delusions" (which can). The testator had recurring delusions throughout his life that affected his ability to dispose of property, including suspicions about those around him. The executor (Sir Charles) was unaware of these delusions and only knew of the testator's

E eccentricities. The court emphasised that English law affords testators complete freedom to distribute property as they wish, including the right to disinherit children. However, when a parent's aversion toward their children exceeds harsh judgment and suggests a mental defect, this can indicate unsoundness of mind.

F **[14]** The burden of proving testamentary capacity lies with the party propounding the will (the defendant), while the burden of proving suspicious circumstances lies with those challenging it (the plaintiffs). In this modern society, the facts that give rise to the test focus on psychosis, where the collection of symptoms of the person having a problem distinguishing what

G is real and what is unreal, with the trigger being the mental and physical conditions.

[15] Undue influence refers to external coercion or subversion that removes or reduces the individual's free will in deciding the distribution of their estate (Herman N *et al*, 2021; Voskou P *et al*, 2018; Shulman K I *et al*,

H 2007). Undue influences such as relationships of dependence, social isolation, frailty or physical health problems are red flags in the mental capacity test (Herman N (*supra*); Shulman KI (*supra*); Glass OM, 2024).

[16] While *Banks* remains the applicable law, researchers advocate for a modern interpretation of *Banks* based on clinical data. Shulman *et a*l (2017),

I for instance, advocate for the testator to be capable of understanding their act of making the will and the nature and extent of the property dispositions. The

testator should also be able to evaluate the claims to his estate, appreciate the conflict and/or complexity in making the will, be capable of communicating clearly, consistently, and rationally regarding property distribution, and be free from a mental disorder, including delusions, that may influence the distribution of his estate.

[17] Specific guidelines and tools have been introduced to assess capacity, including the MacCAT-T, CCTI, ACE, ACCT, CIS, and HCAI. The developers of MacCAT-T, namely Appelbaum and Grisso, established four legal standards for decision-making that a capacity assessment should address: the ability to communicate a choice and understand relevant information, the ability to appreciate the situation and its likely consequences, and the ability to manipulate information rationally (reasoning).

[18] With a rapidly ageing population in most parts of the world, the high prevalence of cognitive impairment that accompanies age will affect the bulk of the transfer of wealth in history to increasingly complex and fragmented families (Brenkel *et al*, 2018). The increase in will challenges necessitate the need for medical experts to assess the legal components that comprise testamentary capacity. The courts would greatly benefit from reliable information on the capacity.

[19] Research indicates that arbitrariness, capriciousness, eccentricity, perceived injustice, and maliciousness are not grounds for challenging testamentary incapacity. However, mentally disabling conditions are generally referred to as developmental or intellectual disability like acquired brain injury, alcohol and drug-related diseases, mental illness and cognitive illnesses like dementia (Carney and Keyzer, 2007). A mentally disturbing condition covers acute or manic depression, withdrawal, reduced motivation, confusion, anxiety, inability to make decisions or even pay attention, poor short or long-term memory retention or delirium (O'Neill and Peisah, 2011). Importantly, a particular diagnosis does not automatically result in the loss of capacity, especially when that capacity is time – and decision-specific, which may be enhanced with appropriate treatment plans (Darzins *et al*, 2000). The effects of medications and any comorbidities must also be considered in any assessment process (Frost *et al*, 2015).

[20] Brenkel *et al*, (2018) above concluded that the close connection between diminished or lost capacity and undue influence cries for a rise in awareness of the risk factors that can increase vulnerability and exposure to abuse, like loneliness, isolation, and emotional and physical dependence. Understanding capacity and vulnerability to undue influence requires a collaborative approach between medical expertise and the law, which is essential to a fairer justice system and the protection of older adults at risk of exploitation (Kirkham J *et al*, 2025).

[21] In *Tho Yow Pew & Anor v. Chua Kooi Hean* [2002] 4 CLJ 90; [2002] 4 MLJ 97:

> It is clear from the foregoing passages, in particular from the passages in *Theobald on Wills* that suspicious circumstances in the context of wills, relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. In other words, if the propounder of a will wishes to succeed in obtaining probate, he must upon a challenge being taken, establish (a) testamentary capacity; and (b) dispel any suspicious circumstances surrounding the making of the will.

[22] The Indian Supreme Court case of *Shivakumar & Ors v. Sharanabasappa & Ors* [2020] (SC) 329 shed light on recent developments in testamentary capacity, which I found to be limited in Malaysia. In *Shivakumar*, the case concerns ownership rights to properties based on the disputed will. The Supreme Court identified multiple suspicious features of the will by examining the minute details of its preparation. The focus was on how the signature was affixed to the will, which involved establishing the following facts: the will consisted of five typed pages on three different sheets of paper of varying colours. The testator's signatures were inconsistently placed, with excessive space between the typed content and signatures on pp. 1 and 5. Different pens were used for signatures – an ink pen for pp. 1 and 5 and a ballpoint pen for p. 3. Pages 2 and 4 (the reverse sides of the pages) were unsigned. Several blank spaces existed in the property descriptions, and the dates mentioned in both Hindi and English calendars did not match. Probably the most glaring was the past event (the shop was vacated in 1990), which was described as something to happen in future.

[23] The Supreme Court outlined several important legal principles regarding wills, particularly on examining wills where the courts do not approach a will with inherent doubts but examine it cautiously and with circumspection. The burden of proof, *ie*, the onus of proving a will, lies on the propounder, who must satisfy the court that the testator signed the will, the testator was of sound and disposing mind, the testator understood the nature and effect of the dispositions, and the testator signed it of their own free will.

[24] When suspicious circumstances surround the execution of a will, the propounder must dispel all legitimate suspicions through cogent and convincing evidence before the document can be accepted as the testator's last will. A circumstance is "suspicious" when it is not normal, not normally expected in a normal situation, or not expected of a normal person. Suspicious features must be "real, germane and valid" and not merely "fantasy of the doubting mind."

[25] When a will's execution is shrouded in suspicion, its proof becomes a matter of the court's conscience rather than a simple dispute between plaintiff and defendant. When multiple abnormal features combine in one document, the document becomes too vulnerable to be readily accepted as genuine, even if individual abnormalities might be explainable.

[26] A careful inspection of the will signed by Mr Tee showed no visible pressure on the paper where the signature was affixed. The paper was in new, smooth condition, which then ignited my curiosity about how the signature was placed and whether it was done with full legitimacy, considering the circumstances Mr Tee was in at the material time.

[27] The literature on testamentary capacity by Zago, S *et al* (2020) addresses the growing issue of contested wills due to the increased prevalence of dementia in ageing populations. The authors present a three-phase methodology for conducting posthumous evaluations of testamentary capacity through neuropsychological autopsy. Phase 1 involves investigating diseases affecting cognitive functioning that might compromise testamentary capacity. Phase 2 focuses on reconstructing the testator's cognitive functioning by examining medical records, analysing handwriting, and gathering testimonial evidence. Phase 3 requires interpreting any neuropsychological deficits in light of legal standards to determine if the testator possessed sufficient capacity when creating the will.

[28] The authors emphasise that testamentary capacity is multidimensional, involving various cognitive functions, including memory, executive functions, and language skills. They note that a dementia diagnosis alone does not automatically invalidate capacity, as capacity depends on the complexity of the testator's affairs and family structure. The methodology provides a systematic approach for forensic neuropsychologists to evaluate a deceased person's cognitive state at the time of will creation retrospectively. It focuses on objective evidence while acknowledging the limitations of posthumous assessment.

[29] Another researcher, Purser, K *et al* (2019), examines the relationship between dementia, cognitive decline, and testamentary capacity – the mental ability to make a valid will. The authors note that cognitive assessment for testamentary capacity is currently conducted in a subjective, unreliable, and non-standardised manner. Despite dementia posing one of the largest threats to testamentary capacity in modern society, there is surprisingly little research on how dementia-related cognitive impairment specifically affects the abilities needed to meet legal criteria for testamentary capacity.

[30] They review the four-limb *Banks v. Goodfellow* test (1870), which remains the standard legal framework for assessing testamentary capacity in many jurisdictions. The authors highlight that while memory and executive

A functions are generally recognised as important for testamentary capacity, there is limited discussion about how specific cognitive impairments directly impact the four legal criteria. They examine how various cognitive domains, including complex attention, executive function, learning and memory, language, and social cognition, all relate to the legal requirements for making
B a valid will.

Testamentary Capacity And Medical Evidence

[31] The evidence raises serious doubts about whether Mr Tee, as the testator, possessed the requisite testamentary capacity when executing the
C will on 6 October 2020. Dr Rajbans made a crucial distinction between being merely "awake" versus truly "alert" – emphasising that a patient can be awake and able to respond without having the mental alertness required for important decisions. He testified: "Patient is awake; he can answer you, but that does not mean you are alert" and "Someone can be drunk and still tell you things that you think, but they are not alert." This medical distinction
D is critical when assessing testamentary capacity.

[32] While Dr Jacob and Dr Rajbans provided expert opinions suggesting a lack of capacity, these opinions were retrospective assessments that carried less weight as they were either based on hypothetical scenarios or
E contradicted by contemporaneous medical records. Dr Lam's clinical notes from 6 October 2020, indicate the testator was alert and oriented, with no recorded confusion or disorientation. The first documented instance of drowsiness occurred on 7 October 2020, following the will's execution.

[33] The defendant's case relies heavily on layperson witness testimony
F regarding the testator's apparent alertness, but these witnesses lack the medical expertise to assess mental capacity properly. Moreover, Dr Lam, who was actually treating the testator, gave evidence indicating possible impairment, stating it was "hard to tell" about the testator's condition and noted he was on significant medication. This contemporaneous medical
G evidence cannot be dismissed in favour of observations by non-medical witnesses.

[34] Dr Lam (PW3), a clinical oncologist who treated patient Mr Tee at Pantai Hospital Kuala Lumpur from 1 to 8 October 2020, until the patient's passing. PW3 said:

H 1. Patient's Condition: Mr Tee had advanced poorly differentiated neuroendocrine carcinoma of the left lung with metastases to liver, pleura, and mediastinal lymph nodes. He was admitted for palliative care, not cancer treatment.

2. Hospital Stay Timeline': Mr Tee was admitted on 1 October 2020, for
I electrolyte imbalance correction – Patient was generally weak but alert during most of his stay – Condition deteriorated significantly on the night of October 7 – Patient passed away at 8:24 AM on 8 October 2020.

3. Medication. Several pain medications were administered, including Fentanyl patch, Abstral, Lorazepam, Amitriptyline, Lyrica (Pregabalin), and Tramadol – On 6 October 2020, only select medications were administered earlier in the day – Higher doses and more medications were administered on 7 October 2020 evening – He confirmed that medications like Fentanyl patch remain effective for up to 72 hours after administration.

4. Mental State: Records showed no indication of confusion, disorientation, or drowsiness from 1 - 6 October 2020 – First record of drowsiness appears on October 7 at 23:20 PM, after administration of multiple medications – He saw no signs of confusion in the patient during his visits – Records noted the patient was "conscious but tired" on 7 October 2020 at 20:30 PM – Patient became unresponsive around 5:00 AM on 8 October 2020.

[35] Dr Lam confirmed the photos taken on 7 October 2020 at 22.54pm with the patient's eyes closed and mouth open after significant medication had been administered. Dr Lam was asked repeatedly about the patient's mental capacity but stated this was outside his expertise as an oncologist.

[36] Dr Rajbans (PW4), a consultant physician and geriatric specialist from Pantai Hospital, gave the following evidence:

1. Patient Background: Mr Tee was admitted to Pantai Hospital on 1 October 2020, with advanced poorly differentiated neuroendocrine carcinoma of the left lung with metastases to lung, pleural, mediastinal lymph nodes and liver – He was admitted for palliative care, not cancer treatment – He had a very poor prognosis and was placed on the "dangerously ill list." – The patient passed away on 8 October 2020 at 8:24 AM.

2. Patient's Condition: When admitted, the patient was critically ill with blood pressure of 60/40 – He was resuscitated and stabilised somewhat but remained very ill with multiple organ problems (liver failure, kidney failure, heart issues) – He diagnosed the patient with depression on 4 October 2020, noting he had expressed desire to end his life – He testified the patient was on high doses of pain medication (including Fentanyl patch equivalent to 60-90mg of morphine).

3. Medication: Fentanyl patch (started 4 October 2020) – Lyrica (Pregabalin) – Amitriptyline (started 6 October 2020 at 8:00 PM as both pain management and antidepressant) – Lorazepam (started 7 October 2020, for sleep and anxiety) and Tramadol.

4. Mental Capacity: He repeatedly opined that anyone on high doses of opioids like Fentanyl would have impaired mental capacity – However, he acknowledged he never performed any formal mental capacity assessment on the patient – He never recorded in the medical notes that the patient was mentally compromised – He confirmed that depression alone would not affect a person's mental capacity – The neurological observation chart on 6 October 2020 showed the patient had good eye reflex, good verbal responses, and appeared oriented.

A 5. Will Signing: He said he was not aware the patient signed a Will on 6 October 2020 around 2:00 PM – When asked if the patient was of sound mind to sign a Will on 6 October 2020, he opined that the patient was not of sound mind, based on the medications he was taking – However, he confirmed that in his clinical notes from 6 October 2020 at 3:00 PM, the patient was awake and able to talk, complaining about "too much
B medication" – He said that if someone had asked him to witness a Will for this patient, he would have advised the patient to stay off pain medication for 24 hours and would have conducted a formal mental capacity assessment.

[37] What is to be determined is whether the patient was only mentally
C compromised and drowsy on 7 October 2020 (when dosages were increased) or whether he was already compromised earlier, specifically on 6 October 2020, when he allegedly signed a will. The plaintiffs' expert evidence provided me with some insights, as permitted under O. 40A of the Rules of Court 2012. Order 40A r. 2 makes it the expert's duty to assist the court on
D the matters within his expertise.

[38] The expert, Dr Jacob (PW1), a senior consultant psychiatrist from Promises (Winslow) Clinic in Singapore, testified as an expert witness regarding the testamentary capacity of Mr Tee, who purportedly signed the will on 6 October 2020, two days before his death from lung cancer.

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[39] Dr Jacob has extensive experience in psychiatry, dating back to 1998, and has provided expert evidence in courts in Singapore and Brunei, including forensic assessments. He reviewed records from multiple hospitals, including Pantai Hospital Kuala Lumpur, where the deceased was admitted from 1 to 8 October 2020.

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[40] He stated that the deceased had stage four neuroendocrine carcinoma of the left lung with liver metastasis and was on multiple medications. On 6 October 2020, the deceased was taking several medications that could impair cognitive abilities:

G (i) Fentanyl (opioid pain medication);

(ii) Lorazepam;

(iii) Amitriptyline (antidepressant);

(iv) Lyrica (Pregabalin);

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(v) Tramadol injection.

[41] Medical records indicated the deceased was "depressed" and "anxious", with doctors noting he "wants to end life" on 4 October 2020, and was still described as depressed on 6 October 2020, with doctors
I considering antidepressant medication.

[42] PW1 testified that no formal assessment of the testamentary treating physician was conducted, and they were unaware of the will signing. He concluded that, on a balance of probabilities, it was highly probable that the deceased did not possess sufficient testamentary capacity at the time of signing of the will due to the influence of multiple medications that can impair cognitive abilities. He also opined the possible depression that can further impair the deceased's judgment, but he noted the absence of any formal capacity assessment.

[43] The cross-examination revealed that PW1 had not personally examined the deceased. The medical records from the day of the will execution showed the deceased was "awake" at the relevant times. While Dr Jacob acknowledged the Glasgow Coma Scale (GCS) recordings showed the deceased was oriented and alert, he maintained this was insufficient to assess testamentary capacity. Also, the medical notes did not specifically mention drowsiness or sedation at the time of the will's execution.

[44] The question boils down to whether the combined effects of terminal illness, pain medication, and depression would have impaired the deceased's capacity to understand and execute a will despite appearing alert and oriented according to nursing observations.

[45] As mentioned earlier, the medical evidence addressed my curiosity about Mr Tee's signature, including the expert's opinion. Despite no assessment of the deceased's mental capacity made before he signed the will, the surrounding circumstances and the absence of evidence to negate his mental incapacity have increased my suspicions about the creation of the will.

Understanding And Approval

[46] Lawyer Tan (DW1), the solicitor who prepared the will, said he had read and explained the will to him, and he indicated his understanding through verbal and non-verbal responses. After signing, lawyer Tan stated that the testator remained sufficiently alert to invite witnesses for coffee and recall the discussion of billing arrangements, demonstrating continued mental clarity. I am unable to accept DW1 as I do not see DW1 telling the whole truth. The narration is very far-fetched. The testator was already on high-drug painkillers, including Fentanyl, when he signed the will. He could not even sign properly; what more chat with DW1 and discuss his payments.

[47] My observation of lawyer Tan during his testimony in the courtroom is that he appeared disengaged, restless, and unable to recall most of the events that were crucial to the defendant's case. His witness statement (DWS1) showed that the will was made in a hurry, with his first instructions from the deceased coming from the deceased's employee, Ms Ismawati, to prepare the will in September 2020. However, DW1 only came to see the

deceased at the end of September 2020, but he was not permitted to do so by the defendant at that time. There was no discussion made on the contents of the will but lawyer Tan drafted the will and read it out to the deceased on his deathbed two days before his demise. Lawyer Tan confirmed that the deceased understood the contents of the will by nodding the deceased's head.

[48] The defendant failed to establish the solicitor-client relationship of lawyer Tan with Mr Tee. There was not any proof to show such relationship. Even Ms Ismawati was not called as a witness to confirm that Mr Tee had instructed her to call lawyer Tan to prepare the will.

Analysis Of Suspicious Circumstances

Alleged Unconsciousness During Will Execution

[49] The plaintiffs rely on a photo and video showing the testator's unconscious state. However, these were taken on 7 October at 10.54pm and 8 October at 2.18am, respectively, more than 33 hours after the will's execution. The contemporaneous medical records from 6 October paint a different picture. The Pantai Hospital clinical progress notes show the testator was "awake" at 12.30pm, had "no complaint of SOB" (shortness of breath) at 2pm, and "looked better" at 3.15pm on the day of the will execution.

[50] Multiple witnesses, including lawyer Tan and Woo Soon Ming, who witnessed the signing of the will, testified that the testator was conscious, coherent, and able to communicate when executing the will. Particularly compelling is the evidence that the testator specifically requested Woo Soon Ming's presence as an additional witness, demonstrating both awareness and decision-making capacity.

[51] The defendant relied on *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, where the Federal Court accepted the testimony of witnesses who saw the execution of the will:

> [30] In our view, the use of those terms by Dr Goh such as confusion, irrational thinking and hallucination must be examined in the light of the evidence of Teoh Ming (DW2) and Chang Fong Lin (DW3) who were present when the deceased executed his will. Reading the evidence of these witnesses including that of Lee Teck Seng (the executor of the will), there can be no doubt that the deceased, although the executor was a very sick man, he understood the nature and extent of the properties he was disposing of under the will and that he was able to comprehend and appreciate the claims of the beneficiaries he had in mind.

[52] What is different in that case is that the executor expressed his intention to make his will as far back as December 1996 and again during Chinese New Year in 1997. The executor passed away on 1 May 1997 while his challenged will was dated 16 April 1997. In this case, Mr Tee has not conveyed his intention to make a will, except for the alleged information that

his staff asked lawyer Tan to see him, make his will a few months before his passing. Furthermore, in *Gan Yook Chin* (*supra*), no evidence was adduced regarding the executor's condition prior to signing his will, except for what Dr Goh had stated.

[53] The evidence before me here reveals troubling inconsistencies among the witness accounts of the will's signing. Despite allegedly being present together, the witnesses gave conflicting testimony about basic facts, including who was present, how the testator indicated his understanding, and what occurred after the signing. For instance, while DW2 Chong Kim Kok testified that the testator invited everyone for coffee afterwards, which they declined, DW6 Woo Soon Ming claimed he stayed chatting with the testator for another 30 minutes. DW2 is not an old friend of the testator but the defendant since secondary school. This raises suspicion that she may have become a witness to the will. These are not minor discrepancies but fundamental contradictions about the same event.

[54] Additionally, the hospital records directly contradict the accounts of the witnesses. The clinical record by nurse Mangdeline Martin Nimos noted only one relative was with the patient (see p. 150), yet multiple witnesses claim to have been present. In comparison, it is a fact that when the deceased was hospitalised in October 2020, Kuala Lumpur did not face any restrictions on movement, as it was under the Recovery Movement Control Order (RMCO) Phase 2 from 10 June 2020 until 31 March 2021. With unrestricted movements, why could not the defendant produce any photographs to show that the will was indeed executed by the deceased on 6 October 2020? No hospital witnesses, including Dr Lam and Dr Rajbans, support their contention that they witnessed the signing of the will during that period on that particular day at the deceased's deathbed.

[55] The record showed the deceased did not want disturbance. This contradicts the defendant's witnesses that the deceased chatted and even wanted to have coffee with them when he was enduring great pain without his oral medication.

[56] I find the defendant's witnesses untruthful as they all had concocted their stories to fabricate how the deceased signed the will.

Relationship With Plaintiffs

[57] The plaintiffs argue that their close relationship with the testator makes their exclusion from the will suspicious. However, the defendant counter-argued that the evidence revealed a different reality. The testator had not visited the first plaintiff in Singapore since his marriage to the defendant. Their communication was infrequent, with the last contact being in March 2020. WhatsApp messages show that most communication with the second plaintiff was centred around requests for money.

[58] Conversely, the evidence demonstrates a close and loving relationship between the testator and the defendant. They have lived together continuously since their 1987 marriage, and witness testimony describes their affectionate relationship even in later years. The will's provisions, therefore, reflect the reality of the testator's relationships rather than raising suspicion.

[59] I believe anyone can make up any story to their benefit, including both parties. In my mind, witness testimonies must be critically assessed together with contemporaneous documents. Perhaps most tellingly, the bank records demonstrate the testator maintained regular maintenance payments to the first plaintiff until his final month, including after his cancer diagnosis. He took deliberate steps to conceal these payments from the defendant, suggesting he felt an ongoing responsibility to his first family while managing complex family dynamics. The will's complete exclusion of the plaintiffs appears inconsistent with this pattern of conduct and raises questions about whether it truly reflected his wishes.

Mental Capacity Due To Illness

[60] The defendant's main argument in defence is based on the medical records, which did not show that the plaintiff's mental capacity was impaired. It is argued that the plaintiffs could not heavily rely on the expert testimony of Dr Jacob, who never examined the testator and based his opinions on medical records and post-mortem analysis. On this point, the defendant referred to *Carmel Mary Soosai v. Josephine Lourdasamy Ratnavathy R Soosai & Ors* [1987] 2 CLJ 426; [1987] CLJ (Rep) 498, where such an opinion carries little weight compared to evidence from those who actually observed the testator.

[61] *Carmel Mary Soosai* (*supra*) was referred by the Federal Court in *Chin Jhin Thien & Anor v. Chin Huat Yean & Anor* [2020] 7 CLJ 137; [2020] 4 MLJ 581, where it was held that:

> (3) It was a well-settled principle that to displace *prima facie* testamentary capacity and due execution of a will, mere proof of serious illness was insufficient. There had to be clear evidence that the illness of the testator so affected his mental faculties as to make him unequal to the task of disposing of his property. There had to be clear evidence to depict an insane delusion existing in the testator's mind at the time he made the will. It was sufficient if, at the time he executed the will, the testator had sufficient mental ability to understand that he was making a will, the effect of making the will and the general nature and extent of his property.

[62] Further, the Federal Court reminded the duty of the court:

> [77] Having said that, we must emphasise that testamentary capacity assessments are ultimately questions of fact to be determined by courts when the issue of a person's capacity arises in the course of legal proceedings. Therefore, the courts must scrutinise of all the relevant

evidence that was presented at the trial before reaching a decision on the balance of probabilities. In *Nicholson v. Knaggs* [2009] VSC 64, Vickery J of the Supreme Court of Victoria said:

> The proper approach of the Court to the question whether a testator has testamentary capacity is clear. Although proof that a will was properly executed is *prima facie* evidence of testamentary capacity, where the evidence as whole is sufficient to throw a doubt upon the testator's competency, the Court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it or, if instructions for the will preceded its execution, when the instructions were given.

[63] While the treating physicians' evidence shows that the testator was ill, it does not establish a lack of testamentary capacity. Dr Lam's testimony confirms that while the testator was weak, he was conscious and able to communicate. It was submitted that the law is clear that physical illness alone does not negate testamentary capacity.

[64] I concur with the law, but the law also indicates that physical illness can impair testamentary capacity. The deceased (testator) suffered not only physical illness but also mental illness when he consumed medications, including high-dosage painkiller drugs, to ease his pain. The side effects of the medicines and drugs led him to become mentally impaired with mood disorders, including depression and bipolar disorder, which may produce cognitive distortions (delusions), compromised judgment, and cause irritability or impulsiveness. These acute or subacute changes may affect testamentary capacity and vulnerability to undue influence. Usually, these changes in mental state can be identified during a specific episode; however, in some cases, they can become chronic (see Shulman *et al*, 2007 in Dr Jacob's expert report, encl. 80, p. 48).

[65] The defendant stressed that the execution of the will itself demonstrates the testator's capacity. He greeted lawyer Tan, understood the purpose of the meeting, made specific requests about witnesses, listened to the will being read, and indicated his understanding and approval. After signing, he even discussed payment arrangements for the will's preparation.

[66] With due respect to the defendant, I find this argument contradicts the medical records that showed the condition of the deceased. In Bundle H (encl. 95), the Pantai Hospital records show that the deceased was in a deplorable state of body and mind. Since the will was allegedly signed at around 2pm on 6 October 2020, the corresponding record entries for that day are relevant.

[67] The deceased's pain flow sheet, where he was able to self-report pain, showed that from 4 October 2020 until 6 October 2020 at 23.00 – his pain was usually relieved by medications. His pain intensity went up to moderate pain on 6 October 2020 when checked at 9.30am, but no entries were made

thereafter until 23.00 with still moderate pain in his general body, abdomen and back. His pain management was with medication and positioning (see p. 68).

[68] At p. 72, his braden scale for predicting pressure ulcer risk showed that on 6 October 2020 at 18.00, under activity-degree of physical activity that the deceased was chairfast where his ability to walk was severely limited or non-existent, cannot bear his own weight and/or must be assisted into chair or wheelchair. His friction and shear are potential problems where the deceased moves feebly or requires minimum assistance, but during a move, he maintained a relatively good position but occasionally slid down in a chair or bed.

[69] As for his movements in signing the will, the records showed the deceased had a weak gait/movement from 1 October 2020 until he passed on. His weakness persisted when he allegedly signed the will on 6 October 2020 (see pp. 73 to 76).

[70] The deceased's clinical collaborative progress notes (pp. 125 to 162) showed the worsened transitions from the day he was admitted on 1 October 2020 until his demise. Particularly from 4 October 2020 at 11am when his medication was, amongst others, changed to a Fentanyl patch of 12.5mg (see p. 139). At p. 143, the entry on 5 October 2020 at 8am showed he was awake and in pain where he could not sleep well the night before. The defendant was reminded to turn the deceased to avoid bed sore. Dr Rajban's entry at 10.30am showed that the deceased wanted to ambulate with a wheelchair. Fentanyl dosage was increased to 25mg since the deceased complained of pain when he woke up at 4.30am (see p. 144). The nurse was instructed to apply the Fentanyl patch at the same time as done on 4 October 2020, at 11am.

[71] The entry (see p. 146) on 6 October 2020 at 6.30am showed the deceased was in pain but refused to take Analgesics and claimed he would die if he took too many painkillers. Further down the notes (see pp. 148 to 149), on the same day at 10am, Dr Rajbans noted that the deceased was in pain and was very concerned that the deceased had not been given Abstral. At 10.30am, Dr Gopi also noted the deceased was having pain from the night and that Abstral was not given. Abstral is an oral medication to be put under the tongue at the deepest part (reference: www.medicines.org.uk).

[72] The entry at 12.30pm showed the deceased refused oral medication and wanted to wait for Dr Rajbans to come. Next, the entry at 2pm (when lawyer Tan was purportedly at the hospital to see the deceased), the deceased still refused oral medication, and he had not taken his lunch yet due to the nebuliser request. He was propped up on the bed and was on oxygen *via* nasal prong.

[73] When Dr Rajbans came at 3.15pm, he wrote that the deceased looked better with the Fentanyl changed to 25mg. He instructed the nurse to serve Abstral 100mg if he cannot bear the pain at night and Tramadol 50mg if the pain persists. He explained to the deceased's daughter the grave prognosis, where he would get worse.

[74] At 3pm on 6 October 2020, the nurse wrote that the deceased was still upset and his daughter requested not to disturb him too much. Dr Gopi saw him at 3.15pm, and at 3.35pm, Dr Rajbans again saw the deceased.

[75] It is no doubt that the deceased was in great pain from 4 October 2020 until his demise. That period of constant pain would include the time when he allegedly signed the will. He was already on increased Fentanyl and Abstral dosages. On the day of the will signing, he was in tremendous pain since he refused to take oral medication, particularly Abstral. He was in an apparent state of poor mental capacity, which would prevent him from holding the pen properly and understanding what was going on. He did not want to be disturbed, which showed his irritant and attempts to endure pain by himself. He would not and could not have six visitors at the same time, crowding his bed while bearing the unbearable pain.

The Defendant's Role And Burden Of Proof

[76] As the propounder of the will and its sole beneficiary, the defendant must prove its validity and dispel suspicious circumstances. The case of *Tob Weng Keong & Anor v. Tob Chee Hoong* [2019] 10 CLJ 150; [2019] MLJU 1435 establishes that where a propounder takes a prominent part in the will's execution while receiving substantial benefits, this itself creates suspicious circumstances requiring careful scrutiny. The evidence shows the defendant was heavily involved in arranging both the will's preparation and execution, with the will being prepared and executed with unusual haste at her arrangement.

[77] The defendant's credibility is further challenged by evidence showing she engaged in an affair with the testator while he was still married to the first plaintiff, a fact she eventually acknowledged under cross-examination. This speaks to both her credibility and the dynamics surrounding the will's creation.

[78] The defendant also failed to rebut the plaintiff's expert report. I admit Dr Jacob's report as evidence after giving it the full analysis required under the law. Following *Rex v. Soh Eng Chiang* [1937] CLJU 73; [1937] 1 LNS 73; [1937] MLJ 247, I find that Dr Jacob's report that is uncontradicted expert opinion to be of sufficient evidence to show that the deceased lacked the mental capacity when signing the will. Dr Jacob's evidence has the overriding weight of testimony where in *Antonio Dios Caldeira v. Frederick Augustus Gray* [1934] CLJU 5; [1934] 1 LNS 5; [1934 1 MLJ 110 his medical evidence he adduced has not been displaced by the evidence.

A Dr Jacob had made the report based on his own knowledge and the facts have been proven independently with his medical references following *Pacific Tin Consolidated Corporation v. Hoon Wee Thim* [1967] CLJU 118; [1967] 1 LNS 118; [1967] 2 MLJ 35.

Conclusion

B

[79] With that, in answering the issues to be tried, I find that – (i) whether the will dated 6 October 2020 constitutes the valid last will and testament of the deceased, the answer is no; (ii) whether the deceased executed the will dated 6 October 2020 as pleaded by the defendant in the statement of defence dated 12 July 2021, the answer is no; (iii) whether there existed suspicious circumstances as pleaded by the plaintiffs in the statement of claim dated 18 May 2021, the answer is yes; (iv) whether at the time of execution of the will dated 6 October 2020, the deceased had "testamentary capacity". No; (v) whether the defendant is entitled to the counterclaim. No; and (vi) whether the plaintiffs are entitled to their claim. Yes.

C

D

[80] The totality of the evidence, namely the questionable capacity evidence, multiple suspicious circumstances, witness inconsistencies, and the defendant's failure to adequately dispel these concerns, all conclude that the will cannot stand.

E

[81] Following the guidance of *H Venkatachala Iyengar v. BN Thimmajamma & Others* 1959 SCR SUPL (1) 426, the court must proceed with an open but nevertheless vigilant and cautious mind. Applying this standard, I would hold that the defendant has failed to discharge her burden of proving this was the valid last will of a testator with proper capacity. The plaintiffs' claims should therefore be allowed with costs, and the defendant's counterclaim dismissed with costs.

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